SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~730~~ 51

ARCHIE WILLIAM HILL,

Petitioner.

vs.

CALIFORNIA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Counsel is attorney of record for A. Terry Carter in a case now pending but not yet tried, in the Superior Court, County of Los Angeles, California ,*People v. Bailey, Carter, et al*, No. A-002539. That case, like the one at bar, involved a search of an entire apartment without warrant and which was not supported by a valid arrest on the premises, all conducted prior to this Court's decision in *Chimel v. California*, 395 U. S. 752 (June 23, 1969). The significant item seized in the Carter search was a personal notebook and its admissibility will seemingly be controlled by the decision in this case since the California appellate courts, on due application, have refused to suppress its use as evidence. Counsel, in addition, represented the Petitioner in *Chimel* in the California courts and before this Court and is therefore familiar with the authorities and reasoning involved in that decision. Counsel is also interested on behalf of the Orange County Criminal Courts Bar Association, an organization of some 100 attorneys who are actively engaged in trial of California criminal cases and who represent an estimated 40 cases which will be affected by decision of this case.

Consent To Filing Amicus Brief

In accordance with Rule 42 of this Court, consent of the parties to filing of an *amicus curiae* brief was sought. Counsel for Respondent, Ronald M. George, Esq. advised on November 26 that Respondent would not consent. If this motion be granted, counsel, in order to avoid delay, is prepared to file a brief within ten days of notice of such action.

Questions Not Adequately Presented

The facts of this case present two fundamental questions:

1. Under the rules announced in *Harris v. United States*, 331 U. S.145 (1946) and *United States v. Rabinowitz*, 339 U. S. 56 (1950). Is it constitutionally permissible to use evidence obtained as fruit of a warrantless search of an entire dwelling based on the mistaken-identity arrest of the sole occupant of the premises?

2. What constitutional standard is applicable to searches which were conducted prior to decision of *Chimel v. California*, 395 U. S. 752 (June 23, 1969)?

A) Is the rule announced in *Chimel* applicable to cases which were on direct appeal on the date of that decision?

B) May private papers which are not contraband be seized in the course of a warrantless search of a dwelling under *Harris* or *Rabinowitz?*

ARGUMENT

Search Incident To An Invalid Arrest

This motion is addressed primarily to the second question presented and the two sub-questions which are necessarily there involved. However, as to the first question it is suggested that one of the major policies protected by the Fourth Amendment is subjected to a wrenching test by the opinion of the lower court. As petitioner observes, this Court's cases which have in the past approved warrantless searches "incident" to arrest have always revolved about a valid arrest. Certainly, the instant situation involves the clearest sort of invalid arrest—it was concededly an arrest of the wrong person. It would seem that the Court would be aided in examination of this question by some review of the historical bases and case authorities which have been held to justify searches conducted without warrant. While the author-

ities relied upon by Petitioner are indeed proper authorities, it is urged that examination of the logical and time-tempered bases of Fourth Amendment prohibitions and exceptions is necessary to considered resolution of the often-recurring questions. Mr. Justice Frankfurter, in his memorable prose, phrased it:

> What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response. *United States v. Rabinowitz*, 339 U. S. 56, 83 (dissenting opinion).

For the foregoing reasons, and despite the holding of the lower court to the effect that an arrest of the wrong person is a valid arrest, it is urged that briefing and argument of the historical bases which have supported searches incident to arrest is necessary to an adequate presentation of the first question noted above.

Standards Applicable To This Search

Although *amicus curiae* is, understandably, rather strongly in favor of retroactivity not only of *Chimel* but of all fundamental Constitutional principles, this may well be a case where it is not necessary to reach that difficult question. Whether or not this is true, though, it would appear essential to the case that both sub-questions set forth above must be simultaneously dealt with. Thus, if the second question is reached, the possible courses of decision would appear to be:

1. *Chimel* is applicable to cases on direct appeal.
2. *Chimel* is applicable to searches conducted on or after

June 23, 1969 only, and searches occurring prior to that date will be considered in light of *Harris*, subject to the narrow limitations imposed on that case by *Rabinowitz*.

3. *Chimel* will be given prospective application only and any prior misinterpretation of *Harris* and *Rabinowitz* need not now be considered, since those cases have been overruled.

Indeed, if these are the possible alternative decisions on this rather thorny issue, then it would appear that discussion and examination of this Court's three latest cases which bear heavily an the two related sub-questions is imperative. Those cases are: *Desist v. United States*, 394 U. S. 244 (1969); *Von Cleef v. New Jersey*, 395 U. S. —— (1969)* and *Shipley v. California*, 395 U. S. —— (1969).** None of these cases appear in the Petitioner's authorities.

Furthermore, it seems clear, from this court's known practice of warning by hint in earlier cases of decisions to follow, that the matter of retroactivity or at least of standards for warrantless searches prior to June 23, 1969, is of some serious concern. As Mr. Justice Harlan pointed out in his concurring opinion in *Von Cleef*, that case appears to suggest a more stringent application of *Harris* while at the same time specifically reserving decision on the question of retroactivity of *Chimel*. In fact, it seems most difficult to square *Von Cleef* with *Abel v. United States*, 362 U. S. 217 (1960). It is therefore urged that additional briefing on these authorities and issues is necessary to a just resolution of this case.

Finally, although the point is touched on by Petitioner, this case seems to involve a peculiarly difficult problem with the now discredited "mere evidence" rule. Of course that rule, soundly

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* 23 L. ed. 2d 728

**23 L. Ed. 732

criticized as it was during its period of vitality. has since gone the way of *Harris* and *Rabinowitz*. Nevertheless, as the Court eloquently observed in *Boyd v. United States*, 116 U. S. 616 (1885) there arise many occasions when the protections of the Fourth and Fifth Amendments overlap. Indeed, the gravest problems are presented when, as in this case, the seizure is of that one most personal and private possession, a man's secret diary. One might well ask whether a seizure of private property without warrant is ever constitutionally permissible when the property involved or the circumstances are such that no warrant could have been legally obtained. Suppose a magistrate had stood at Hill's door just before it was opened, with all necessary papers before him, could he have issued a valid warrant to search for and seize, or for that matter even to read, Hill's diary? If not, then it follows that a seizure which may not be carried out under warrant certainly may not be done without warrant. To suggest otherwise is to suggest repeal of the Fourth Amendment .This no court may do. Since the landmark case relative to the "mere evidence" rule, *Warden v. Hayden*, 387 U. S. 294 (1967) has not been examined by Petitioner, it is believed that additional briefing on the point might be of aid to the Court.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully requested that the Court make its order granting counsel leave to file a brief in this cause as *amicus curiae*.

KEITH C. MONROE
Amicus Curiae in
Support of Petitioner